No. 89-640

In the Supreme Court of the United States

OCTOBER TERM, 1989

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

NATIONAL WILDLIFE FEDERATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution, statute and rule:

Miscellaneous:

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This is a case about standing jurisprudence—and, more specifically, about whether a federal court may effectively supply the requisite proof of standing by "presuming" facts that the parties did not—and perhaps cannot—allege on their own. The court of appeals held that respondent had sufficiently demonstrated its standing in this case when it submitted the single affidavit of one of its members, Peggy Kay Peterson. Peterson averred that her recreational use of federal lands "in the vicinity of the South Pass-Green Mountain area of Wyoming" had been af-

fected by unlawful actions taken by petitioners. Although the court of appeals acknowledged that only 4,500 acres of that 2,000,000 acre federally-managed area had been affected by petitioners' land use decisions, and that Peterson had not alleged any use of those particular 4,500 acres, the court held that the affidavit could be read "to *presume* that the 4500 newly opened acres included the areas that Peterson uses" (Pet. App. 16a-17a). Without such a "presumption," the court added, Peterson's use and enjoyment "would not be 'adversely affected.' * * * If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious." *Ibid.* Refusing to entertain either possibility, the court of appeals determined that Peterson's language must be "read to refer to the lands affected by the Program." *Ibid.* And, by "presuming" the necessary facts, the court conferred standing on respondent to challenge not only the order pertaining to the 4,500 affected acres in the South Pass-Green Mountain area, but also those relating to the entire 180,000,000 acres of federal land at stake in the litigation.

We restate the court of appeals' decision because respondent evidently has no desire to defend it on its own terms. Disavowing the court's actual holding, respondent offers a variety of alternative rationales, each equipped with its own form of relief. First, respondent asks the Court to dismiss the writ of certiorari, contending that the court of appeals' ruling that the district court abused its discretion in refusing to consider the supplemental affidavits—proffered after the close of the summary judgment hearing in violation of Fed. R. Civ. P. 56(c)—was merely an application "of local practice" (Resp. Br. 17), and is therefore unworthy of this Court's review. Second

and alternatively, respondent asks that the court of appeals' decision be affirmed, in that Peterson's and Erman's affidavits, when "read together with the Government's own evidence" (*id.* at 15), sufficiently established the organization's standing. Finally, and again alternatively, respondent asks the Court to remand the case for a decision on the sufficiency of its "informational standing" allegations, notwithstanding the trial court's determination that the Greenwalt declaration, in which those allegations were made, was "conclusory and completely devoid of specific facts" (Pet. App. 32a).[1]

1. Respondent makes no effort to defend the reasoning of the court of appeals. Instead, it devotes the major portion of its brief to the question whether certiorari should be granted in this case—a question that the parties fully debated at the petition stage. Elaborating on the argument previously made in its brief in opposition (at 20-22), respondent asserts that the sufficiency of the Peterson affidavit need not be considered by this Court, in light of the supplemental affidavits submitted to the trial court but rejected by that court as untimely. In respondent's view, the court of appeals' decision, setting aside the trial court's conceded exercise of discretion (Resp.

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[1] Although correctly observing that "standing 'in no way depends on the merits of the [claim]'" (Resp. Br. 22 n.35 (brackets in original)), respondent nonetheless repeatedly characterizes petitioners' termination and revocation decisions as politically motivated (*e.g.*, *id.* at 4), damaging to the environment (*e.g.*, *id.* at 34-35), and otherwise unlawful (*e.g.*, *id.* at 41). Without attempting to address the merits, we note that in the one discrete case evaluated by the district court—indeed, the very case challenged in the Peterson affidavit—petitioners' termination decision was found to be entirely consistent with the law. See Pet. App. 35a n.12 (termination of Classification W-6228).

Br. 19), was simply a matter "of local practice" (*id.* at 17), consistent with "the spirit of this Court's rulings" (*id.* at 17-18), and with "fundamental" fairness (*id.* at 19). In light of this alternative (but assertedly unimportant) ground for the judgment below, respondent urges this Court to dismiss the writ of certiorari. That contention is flawed at every turn.

a. As an initial matter, respondent's effort to renew the battle to deny certiorari is inappropriate. Our petition presented two questions for review: the sufficiency of the Peterson affidavit; and the propriety of summary judgment, in light of respondent's failure to make a timely showing of standing. Pet. I. Had this Court concluded that the second question was unworthy of review—as respondent again urges—it could have limited the grant of certiorari to the first question only. The Court elected to review both questions, and in our view it did so correctly. Even if, as respondent suggests, the second question might not have independently warranted this Court's review, the two questions taken together present the case in its full context and raise important issues of federal court superintendence of the day-to-day operation of Executive Branch activities.[2]

b. In any event, respondent's reliance on the supplemental affidavits is unavailing. It is important to recount the circumstances under which the trial court declined to accept the supplemental affidavits. Throughout this extended litigation, respondent en-

[2] Respondent's amici Wilderness Society et al. err in contending that the appropriateness of the trial court's decision rejecting the supplemental affidavits "is not fairly encompassed within the question upon which the Court granted review." Amici Br. 6-7 n.1. As noted, the Court granted two questions, and the supplemental affidavit issue is at the heart of the second question presented.

joyed repeated opportunities to offer additional evidence on the question of standing, but steadfastly refused to supplement the record. Indeed, respondent early on resisted the government's effort to secure discovery on the standing issue, contending that further inquiry "would be unreasonably cumulative, duplicative, burdensome and expensive" (Motion to Quash and for a Protective Order at 7; Pet. App. 170a).[3] Even after the government filed its summary judgment motion specifically addressed to standing, respondent chose to submit no further evidence to the court.[4] And respondent itself moved for summary judgment—which required it to assure the district court that there were no material issues of fact outstanding, including issues of fact going to standing (see June 23, 1986 Motion for Summary Judgment). Respondent thus quite deliberately chose to join issue on the basis of its initial affidavits.

Only after the conclusion of the hearing on summary judgment, when the district court asked for additional legal *memoranda*, did respondent come

[3] Respondent notes that the government contested the sufficiency of the supplemental affidavits before the court of appeals, but finds it "significant" that we have not done so in this Court. Resp. Br. 16 n.23. There is no reason for us to do so: the trial court declined to accept those affidavits, and our submission in this Court is that the trial court exercised its discretion correctly. Further, in light of the trial court's decision, we had no occasion to inquire into or contest the sufficiency and bona fides of the supplemental affidavits. This Court, moreover, is hardly the place to conduct fresh discovery.

[4] Indeed, in its opposition papers, respondent insisted that "[t]he three standing affidavits" it had previously submitted were "far more than is necessary to prove standing." Plaintiff National Wildlife Federation's Memorandum In Response To Defendants' Motions To Dismiss And Cross Motions For Summary Judgment at 5.

forward with new *affidavits*, while offering no excuse for the tardy submission.[5] The trial court acted well within its discretion in declining the proffer.[6] And the decisions of this Court and others—whose "spirit" respondent invokes (Resp. Br. 17-18 & nn.27, 28)—do not hold or suggest the contrary.[7]

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[5] Respondent contends that "in light of the fluid state of the record," it "was not unreasonable * * * to interpret" the request for supplemental "memoranda" as an invitation to submit "additional affidavits." Resp. Br. 19. This will not do; lawyers know the difference between legal memoranda and factual affidavits.

[6] See *Clinkscales* v. *Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 (11th Cir. 1987); *Farina* v. *Mission Investment Trust*, 615 F.2d 1068, 1076 (5th Cir. 1980); *Beaufort Concrete Co.* v. *Atlantic States Constr. Co.*, 352 F.2d 460, 462-463 (5th Cir. 1965), cert. denied, 384 U.S. 1004 (1966).

[7] For example, in *Warth* v. *Seldin*, 422 U.S. 490, 518 (1975), the Court affirmed the dismissal of the complaint by the district court for lack of standing, without giving the plaintiffs an additional opportunity to develop factual support. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), did not involve a remand either: the only issue before the Court was whether to sustain the grant of a preliminary injunction. In *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), the Court held that two of the individual plaintiffs lacked standing to sue, but, noting that it "encounter[ed] the[] allegations at the pleading stage" (*id.* at 112), remanded the case so that the trial court could, if it chose, "permit [the plaintiffs] * * * to amend their complaints" (*id.* at 112-113 n.25). Similarly, in *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 377-378 (1982), the Court remanded for further factual development on standing. In the *Havens* case, however, the Court noted that the lower court's dismissal had been on the pleadings alone, and it directed a remand for the purpose of affording plaintiffs an opportunity to make more definite the allegations of the complaint. Here, by contrast, it was not the pleadings alone, but also the evidence submitted in support of the pleadings, that was deficient. Moreover, respondent had repeated

No rule "of local practice" (Resp. Br. 17) required the trial court to accept the supplemental affidavits. In the first place, there is no such "local rule" in the District of Columbia Circuit. Certainly the single case relied on by the court of appeals for its decision (Pet. App. 21a), and the cases cited by respondent (Resp. Br. 17-18 n.26), announce no principle that requires district courts to accept tardy filings in summary judgment proceedings.[8] And even were it a

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opportunities over several years to remedy the defects. It chose not to do so. For the same reason, respondent's reliance (Resp. Br. 18 n.28) on two court of appeals decisions—for the unexceptionable proposition that summary judgment may not be entered without affording the opposing party an opportunity to present evidence—is misplaced.

[8] In none of the cited cases did the District of Columbia Circuit require a district judge to accept affidavits that he had found to be untimely. For example, in *National Wildlife Federation* v. *Hodel*, 839 F.2d 694 (1988), the court noted that, in a prior appeal, it had ordered the district court to receive affidavits relating to standing; but in that case the district court had "initially made no fact findings on the subject" (*id.* at 703), and there was no indication that the district court had declined in the prior proceedings to accept affidavits from the parties. Similarly, in *Wilderness Society* v. *Griles*, 824 F.2d 4 (1987), although the court of appeals ordered the district court to permit further discovery on the standing issue, the district court had previously refused to permit *any* discovery relating to standing. In *DKT Memorial Fund, Ltd.* v. *Agency for International Development*, 810 F.2d 1236 (1987), the court permitted the plaintiff to amend its complaint to add an allegation it had "inadvertent[ly]" omitted (*id.* at 1239); but there was no suggestion that the district court had prohibited the plaintiff, due to tardiness or otherwise, from doing so. And in *Phillips Petroleum Co.* v. *FERC*, 792 F.2d 1165 (1986), the court of appeals directed the plaintiff to file a supplemental statement regarding standing; there is no indication that the district court had declined to accept such a statement.

"local practice" to absolve litigants of their own delay, such a "practice" would contravene "the plain language of Rule 56(c)" of the Federal Rules of Civil Procedure (*Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986)), which provides that an "adverse party" may serve "opposing affidavits" in summary judgment proceedings, but only "prior to the day of the hearing." Respondent's supplemental affidavits were submitted *after* the day of the hearing. The "local practice" invoked by respondent—under which advocates could supplement the record whenever they thought they were in danger of losing—could not survive a conflict with Rule 56(c). See *United States* v. *Hasting*, 461 U.S. 499, 505-509 (1983); *United States* v. *Payner*, 447 U.S. 727, 733-737 (1980).[9]

c. Respondent contends that we ourselves filed an untimely document and that it would "be wholly unfair—and in fact a violation of fundamental rights—for the Government to spring this evidence on [respondent] at the hearing and then prevent it from filing counter-evidence" (Resp. Br. 19). The record belies that assertion.

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[9] Respondent never precisely articulates the "local practice" that entitled it to submit new factual materials after the close of the summary judgment hearing. It appears, however, that the "practice" applies whenever a party believes—however wrongly—that it has "already submitted sufficient evidence," and discovers—however late in the day—that the trial court may have "serious[] question[s]" concerning the strength of its argument. Resp. Br. 21-22. Such a "practice," of course, is a recipe for interminable litigation: as soon as one party appears likely to lose, he is entitled to reopen the proceedings and shore up his position. The "local practice" asserted by respondent thus "calls to mind what was said of the Roman Legions: that they may have lost battles, but they never lost a war, since they never let a war end until they had won it." *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 702 (1981) (Rehnquist, J., dissenting).

During the oral argument on the summary judgment motion, respondent's trial counsel contended that the government had "presently completed only twenty-five of a hundred-fifty required [Resource Management] Plans." July 22, 1988 Tr. 12. As a result, counsel argued, the government's actions "could not possibly have been executed in reliance upon the land use plans required by FLPMA." *Id.* at 13. In response, government counsel advised the court that the figure cited by respondent's counsel was out of date. "The current figures," counsel reported, "indicate * * * that there are now 50 approved [plans]," an additional 14 plans "where notice of intent to proceed [has] * * * been given," and "ten additional in draft and eight more in proposed findings." *Id.* at 53. The court then asked counsel to specify the total acreage covered by the approved RMPs. *Id.* at 55. In response, counsel offered to submit a four-page document "that gives the particulars." *Ibid.* The court instructed counsel to mark the exhibit, supply a copy of it to respondent's counsel, and leave a copy with the clerk. *Id.* at 55-56. Without objection from respondent, government counsel did so. *Id.* at 56.

Plainly, the government did not "spring this evidence on [respondent] at the hearing" (Resp. Br. 19).[10] Addressing an issue first raised during the hearing *by respondent*, the government simply corrected respondent's reliance on stale data. More pertinently for present purposes, the RMP exhibit had nothing whatever to do with respondent's standing to

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[10] Indeed, respondent's failure to object to the submission doubtless reflected its "recognition that the action of the trial judge" in accepting the exhibit "was unexceptionable." *Johnson* v. *United States*, 318 U.S. 189, 203 (1943) (Frankfurter, J., concurring).

sue; as respondent itself has acknowledged at an earlier point in this case, the exhibit dealt solely with "the substantive merits of [petitioners'] case" (Br. in Opp. 21 n.14). Respondent's supplemental standing affidavits were in no sense "counter-evidence" (Resp. Br. 19) whose filing was somehow required by the RMP exhibit. Certainly the supplemental filings themselves made no reference whatever to the RMP exhibit (see Br. in Opp. App. 1a-17a), or to any other filing by the government. Nor did respondent seek leave from the trial court to "counteract" the RMP exhibit. Respondent proffered the supplemental affidavits not to refute the government's evidence, but to ward off defeat. It did so too late.

d. In short, the court of appeals erred, and erred badly, in reversing the trial court's refusal to accept supplemental affidavits that were untimely under Rule 56(c) and submitted in violation of court order. Under the circumstances, the trial court had every right to reject them. The court of appeals' contrary view does not furnish a basis for dismissing the writ of certiorari.[11]

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[11] Respondent observes that this Court has traditionally been "'reluctan[t] to review decisions of the courts of the District [of Columbia] involving matters of peculiarly local concern.'" Resp. Br. 17 n.25 (quoting *Pernell* v. *Southall Realty*, 416 U.S. 363, 366 (1974)). The quotation is from a case reviewing a decision not of the Court of Appeals for the District of Columbia Circuit, but rather the District of Columbia Court of Appeals, in many respects the counterpart of a state supreme court. The propriety of deference to such a court on questions of "peculiarly local concern" has of course nothing whatever to do with review of a federal circuit court's rulings on matters of "general federal law," *ibid.*, including interpretations of the Federal Rules of Civil Procedure.

2. a. When, at long last, respondent turns its attention to the sufficiency of the Peterson affidavit (Resp. Br. 26-35), it embraces the central failing of the court below—"inferr[ing]" standing "argumentatively from averments in the pleadings." *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 608 (1990). Indeed, although respondent expressly disavows the court of appeals' "presumption" (Resp. Br. 32), its effort at bolstering Peterson's affidavit simply recapitulates that presumption in another guise.

Attempting to tie Peterson to the affected 4500 acres, respondent reasons as follows: Peterson "referred to the South Pass-Green Mountain area 'opened' to mining" (Resp. Br. 29); only 4455 acres were actually opened to mining (*ibid.*); therefore Peterson's affidavit must be construed to allege use of land "in the vicinity" of these specific 4455 acres.[12] But Peterson made no such allegation. What she *said*

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[12] Respondent offers what appears to be yet another proposed construction of the Peterson affidavit. It notes that there is "a specific pass" named "South Pass" and "a specific mountain" called "Green Mountain." From that, respondent infers that Peterson's affidavit must be understood as alleging a use of lands "'in the vicinity of' these particularized places." Resp. Br. 29. But as the trial court found (Pet. App. 35a), "Green Mountain" and "South Pass" are not "particularized places"; they are vast regions in Central Wyoming that comprise millions of acres of federal land. Not surprisingly, Peterson referred to "South Pass-Green Mountain, Wyoming" and "the South Pass-Green Mountain area of Wyoming"—obviously referring to a region, and not to a specific pass and mountain. That, in turn, made perfect sense, since the 4500 affected acres do not all fall within or even near the particular mountain and pass (which are themselves quite far from each other), but within the much larger region that takes its name from those landmarks.

was that she uses federal lands "in the vicinity of the South Pass-Green Mountain area of Wyoming" (Pet. App. 190a)—a region that the trial court found to include some 2,000,000 acres (Pet. App. 35a). Peterson did *not* claim to use land near the affected parcels; she did not even *specify* the affected parcels, even though those parcels had been individually identified in the Federal Register nearly two years before she filed her affidavit. See 49 Fed. Reg. 19,904-19,905 (1984). Respondent *knew* which 4500 acres were affected; if Peterson or any other of its members *could* have alleged use of those parcels or specific areas near those parcels, presumably they *would* have. Indeed, it was precisely because Peterson did *not* expressly demonstrate a connection to the affected acres that the court of appeals felt it necessary to "presume" a connection on her behalf. But as the same Circuit has noted in a prior decision, "[w]here the claimed injury involves access to land, the required showing involves the specification of the land that the plaintiff intends to use that the challenged action will affect. Otherwise, we cannot be certain enough that the plaintiff will himself be among the injured." *Wilderness Society* v. *Griles*, 824 F.2d 4, 15 (D.C. Cir. 1987).

It makes no difference that "[t]he Government can hardly feign confusion" (Resp. Br. 29) about which lands were affected within the Green Mountain/South Pass region. The question is not whether we know where the affected acres are; anyone who reads the Federal Register can find that out. What matters is whether respondent proved a connection to those acres sufficient to support its standing to sue. After all, in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), the government undoubtedly was not "confused" about the location of Mineral King and Sequoia National Park; but that did not avail the plaintiff when it failed to demonstrate a sufficient interest in those particular lands. See *id.* at 735.

Nor can respondent rest its standing on the fact that "the harm that comes from mining * * * is not localized" (Resp. Br. 30). We freely acknowledge that mining may have an impact beyond the property actually being mined. But "obscured landscapes," "fugitive dust," "violat[ion] [of] noise levels," and the like (*ibid.*) do not confer standing on persons who use land hundreds of miles from the site, and thus lack a "distinct and palpable" interest in the premises (*Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). As far as one can tell from her affidavit, Peterson has never been anywhere near the particular parcels opened to the staking of mining claims.[13]

Finally, contrary to respondent's assertion (Resp. Br. 31-32), this Court has *not* accepted claims like those contained in the Peterson affidavit. For example, in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), the Court held that plaintiffs had established their standing to raise a constitutional challenge arising from the construction of two nuclear power plants. But the plaintiffs' proof of standing in that case was quite specific: after a four-day hearing (*id.* at 72), the district court found that the operation of the plants would cause "a 'sharp increase' in the temperature of

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[13] Indeed, because Peterson did not identify where she was, or what lands she was complaining about, the government was disabled from proving that the lands in question had never been mined, and that there were no prospects for mining in the future. See J.A. 73, 108 (detailing minimal number of mining claims filed on the 180,000,000 acres of land subject to terminations or revocations).

two lakes presently used for recreational purposes" by the plaintiffs (*id.* at 73). Respondent has offered no comparable evidence in this case.

Respondent's reliance (Resp. Br. 32, 37) on *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), is also misplaced. First, unlike the plaintiffs in *SCRAP*, respondent has never advanced "allegations which, if proved, would place [respondent] squarely among those persons injured in fact by the [government's] action * * *." *SCRAP*, 412 U.S. at 690. Even if true, Peterson's central allegation—that she "use[s] federal lands, including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment" (Pet. App. 190a)—does not by its terms assert any "injury in fact by the [government's] action" in this case. To the contrary, Peterson could easily use and enjoy the vast expanse of the 2 million-acre South Pass-Green Mountain area without ever happening upon, or being in any way injured by, activities on the 0.225 percent of the land that was actually affected by the only challenged land action in this region.

Second, respondent fails to acknowledge *SCRAP*'s additional teaching that, while the simple allegation of specific and perceptible harm may suffice to withstand a motion to dismiss for lack of standing, on a motion for summary judgment the plaintiff must show that its allegations are "true and capable of proof at trial." *SCRAP*, 412 U.S. at 689. The assertion of injury in the Peterson affidavit was clearly not sufficient at summary judgment, when respondent bore an affirmative burden to establish this essential element of its case. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). Respondent's claim, at bottom, is that Peterson used some land in the vicinity of a

huge area, a small fraction of which has been affected by challenged activities. As generous as it is, *SCRAP* does not support so extravagant an assertion of standing.[14]

In sum, like the court below, respondent has failed to breathe life into the Peterson affidavit.[15] Because

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[14] The lower court cases cited by respondent (Resp. Br. 31 n.50) likewise provide no support for the proposition that vague allegations about use of land "in the vicinity" may satisfy standing requirements under Article III and the Administrative Procedure Act. See, *e.g.*, *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817, 822-823 (D.C. Cir. 1976) (plaintiff's members lived in a county expected to receive 30,000 new residents as a result of placement of Trident missile base there); *Coalition for the Environment* v. *Volpe*, 504 F.2d 156, 163-164 (8th Cir. 1974) (plaintiff's representatives lived near, drove over, and passed through the precise site of a proposed 1,700 acre, 12,000 person development); *Committee for Jones Falls Sewage System* v. *Train*, 539 F.2d 1006, 1015 (4th Cir. 1976) (plaintiff's members—challenging the discharge of raw sewage into Jones Falls—"live in the neighborhood through which Jones Falls flows"); *Natural Resources Defense Council, Inc.* v. *Outboard Marine Corp.*, 692 F. Supp. 801, 807 (N.D. Ill. 1988) (in citizen suit challenging alleged pollution of Lake Michigan and Waukegan Harbor, affidavits asserted that individuals used the lake and the harbor by walking along their shores and swimming in them).

[15] Respondent places passing reliance (Resp. Br. 35-37) on the Erman affidavit, but, as noted in our opening brief (at 37-38 n.27), that affidavit is insufficient for the same reasons as the Peterson affidavit. In connection with the Erman affidavit, respondent asserts that Judge Williams, in his opinion dissenting from the earlier panel opinion, "stated that the Government * * * conceded in oral argument that 'some of the acreage opened to mining was in the vicinity of lands used by one of [NWF's] members in Arizona.'" Resp. Br. 37. In fact, we made no such concession, and Judge Williams did not say we did. In the text of his opinion, Judge Williams referred to a "concession" at oral argument, but the accom-

the requisite proof does not " 'affirmatively appear in the record' " and " 'may not be gleaned from the briefs and arguments themselves,' " (*FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. at 608, 610), respondent lacks standing to challenge even the Green Mountain/South Pass termination.

b. Still less does respondent's evidence support its challenge to the hundreds of other orders, affecting the remaining 178,000,000 acres. As the court below acknowledged (Pet. App. 13a), respondent's lawsuit arises under Section 702 of the Administrative Procedure Act, 5 U.S.C. 702, which authorizes judicial review at the behest of a person "adversely affected or aggrieved by agency action." Under that provision, a person aggrieved by a particular governmental order affecting particular lands may challenge that order in court. The suit authorized by 5 U.S.C. 702 is directed to the final "agency action" itself (embodied in that order); that provision does not authorize a more general judicial supervision of the

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panying footnote makes clear that "[c]ounsel for Mountain States," and not the government, made that concession (which we disavow). See Pet. App. 90a & n.2. Moreover, that is exactly how the court below understood Judge Williams' statement. See *id.* at 18a n.13. And neither of the other two record citations noted by the respondent (*id.* at 55a, 85a) reflects a concession by the government about standing.

Respondent also states that "[n]o defendant challenged the standing of the congressional intervenor." Resp. Br. 10 n.17. Again, that is not so. Both the government and Mountain States filed motions opposing Representative Seiberling's intervention on standing grounds. See Defendants' Opposition to Motion to Intervene of Congressman Seiberling, filed November 4, 1985; Motion by Defendants Mountain States Legal Foundation and Mineral Exploration Coalition in Opposition to Motion to Intervene of the Honorable John Seiberling, filed November 8, 1985.

agency program or policy pursuant to which the particular order (the "agency action") was adopted.

The present case illustrates the inappropriateness of overarching, "programmatic" assaults on governmental policy, rather than the specific "agency action" generated by that policy. Given the heterogeneous nature of the actions and lands in this case, it is entirely possible—likely, in fact—that some number of the challenged land actions (for example, the record clearing actions (see Pet. Br. 11 & n.10)) may have had absolutely no adverse effect on anyone. In such circumstances, it would be wholly inappropriate to assume injury-in-fact with respect to *all* of the challenged actions, absent some showing of injury with respect to each.[16]

Where, as here, a case-by-case inquiry into each land action is required, respondent does not have standing to challenge the whole range of actions, affecting tens of millions of acres of land, based simply on an alleged injury to a single person from

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[16] There is, moreover, no basis for—as well as no legal significance to—respondent's assertion that the individual governmental actions at issue constitute, in the aggregate, a "program" to open lands to commercial development. As we have recounted in our opening brief (at 4, 7-8), the evidence showed that over a period of years beginning in the 1950's, the agency undertook to rationalize existing withdrawals and classifications on a case-by-case basis. And it did not do so, as respondent repeatedly suggests, in an arbitrary manner. Indeed, in the one land action reviewed on the merits by the district court—the Green Mountain/South Pass termination, challenged in the Peterson affidavit—the court concluded that the evidence "completely answers plaintiff's claims of inadequate land use plans, lack of conformance determinations, and insufficient opportunities for public participation." Pet. App. 35a n.12.

action taken on a single parcel. None of the cases respondent cites (Resp. Br. 25 n.40) supports such a proposition, and we know of none that does. Rather, as this Court's decision in *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 345 (1977), suggests, respondent's broad-based attack on a policy approach must give way to individualized proof with respect to the discrete agency actions. Standing principles require a showing of injury for each agency action as to which respondent seeks judicial relief. Without such a showing of particularized injury, trial of the merits will truly be, as Judge Williams put it, "adjudication in a vacuum" (Pet. App. 105a).

3. Finally, and again alternatively, respondent asks the Court (Resp. Br. 42-45) to remand the case to the court of appeals so that it may assess the sufficiency of the "informational standing" allegations contained in the Greenwalt declaration. There is no reason to do so: the district court found those allegations "conclusory and completely devoid of specific facts" (Pet. App. 32a), and its judgment on that score is correct. As we explained in our opening brief (at 41-43), respondent has never asserted that it sought to obtain specific information and was turned away, or that it sought to participate in the decisionmaking process but was denied access. For that reason, respondent's reliance (Resp. Br. 42, 44) on *Public Citizen* v. *United States Department of Justice*, 109 S. Ct. 2558, 2563 (1989), is of no help to its cause.[17]

[17] Respondent's reliance on *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 379 (1982), is mystifying indeed, since the plaintiff organization in that case predicated its standing on the defendants' alleged racial steering practices and their effect on the organization's services to its clientele, not on any failure on defendants' part to create and furnish particular information.

Moreover, as respondent freely concedes (Resp. Br. 44), the documents it seeks do not exist, and respondent's claim is simply that documents be *created* on its behalf. But respondent's desire that the government generate information provides no basis for standing that would differentiate respondent from any other party that may wish to inform itself or disseminate information to others. To the extent respondent seeks to assert a right to require the government to generate information about particular governmental actions or lands, it must establish its standing by showing the requisite personal interest in those actions or lands. And, as we have explained, that is precisely what respondent failed to do in this case. In short, respondent's claim of standing on this score simply presents in a different guise the same standing question raised by respondent's other claims.[18]

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

APRIL 1990

[18] Thus, the Greenwalt declaration adds nothing of substance to respondent's claim of standing. See Pet. Br. 42 n.32.

* The Solicitor General is disqualified in this case.

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